

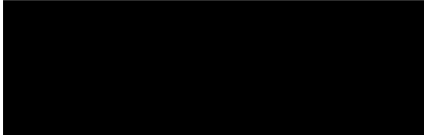


U.S. Department of Justice

Immigration and Naturalization Service

B7

OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536



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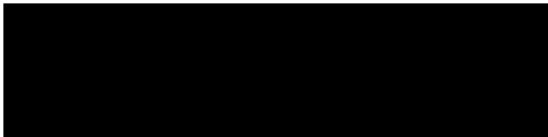
File: [REDACTED] Office: Texas Service Center

Date: JAN 10 2001

IN RE: Applicant: [REDACTED]

Application: Immigrant Petition by Alien Entrepreneur Pursuant to § 203(b)(5) of the Immigration and Nationality Act, 8 U.S.C. 1153(b)(5)

IN BEHALF OF APPLICANT:



Identifying information is used to prevent clearly unwarranted invasion of personal privacy

INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATION

Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Texas Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner seeks classification as an alien entrepreneur pursuant to § 203(b)(5) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1153(b)(5).

The director determined that the petitioner had failed to demonstrate that he had established a new commercial enterprise, had invested the required amount of capital, and the lawful source of his funds.

On appeal counsel does not challenge the director's assessment of the facts or the interpretation of the four precedent decisions issued by the Administrative Appeals Office. Counsel's sole argument is that because the petitioner was in the planning stages of his investment prior to the issuance of the precedent decisions, the Service should not rely on the precedents when adjudicating his petition. Therefore, this decision will first review the director's application of the law, regulations and precedent decisions and subsequently address counsel's concerns regarding the director's reliance on the precedents.

The appeal also contains a request for oral argument. Oral argument is limited to cases in which cause is shown. A petitioner must show that a case involves unique facts or issues of law that cannot be adequately addressed in writing. In this case, no cause for oral argument is shown. Therefore, the petitioner's request for oral argument is denied.

Counsel also submits a "Motion to Consolidate" this appeal with that of another petition. As the regulations do not provide for this type of motion, it will not be considered. Every appeal is adjudicated on its own merits based on the documentation and legal briefs submitted in support of the appeal and contained in the record.

Section 203(b)(5)(A) of the Act provides classification to qualified immigrants seeking to enter the United States for the purpose of engaging in a new commercial enterprise:

- (i) which the alien has established,
- (ii) in which such alien has invested (after the date of the enactment of the Immigration Act of 1990) or, is actively in the process of investing, capital in an amount not less than the amount specified in subparagraph (C), and

(iii) which will benefit the United States economy and create full-time employment for not fewer than 10 United States citizens or aliens lawfully admitted for permanent residence or other immigrants lawfully authorized to be employed in the United States (other than the immigrant and the immigrant's spouse, sons, or daughters).

The petitioner indicates that the petition is based on an investment in American Capital Investors, Inc., a new commercial enterprise which will create employment in two targeted employment areas for which the required amount of capital invested has been adjusted downward to \$500,000.

INVESTMENT OF CAPITAL

8 C.F.R. 204.6(e) states, in pertinent part, that:

Capital means cash, equipment, inventory, other tangible property, cash equivalents, and indebtedness secured by assets owned by the alien entrepreneur, provided the alien entrepreneur is personally and primarily liable and that the assets of the new commercial enterprise upon which the petition is based are not used to secure any of the indebtedness. ...

Invest means to contribute capital. A contribution of capital in exchange for a note, bond, convertible debt, obligation, or any other debt arrangement between the alien entrepreneur and the new commercial enterprise does not constitute a contribution of capital for the purposes of this part.

8 C.F.R. 204.6(j) states, in pertinent part, that:

(2) To show that the petitioner has invested or is actively in the process of investing the required amount of capital, the petition must be accompanied by evidence that the petitioner has placed the required amount of capital at risk for the purpose of generating a return on the capital placed at risk. Evidence of mere intent to invest, or of prospective investment arrangements entailing no present commitment, will not suffice to show that the petitioner is actively in the process of investing. The alien must show actual commitment of the required amount of capital. Such evidence may include, but need not be limited to:

(i) Bank statement(s) showing amount(s) deposited in United States business account(s) for the enterprise;

(ii) Evidence of assets which have been purchased for use in the United States enterprise, including invoices; sales receipts; and purchase contracts containing sufficient information to identify such assets, their purchase costs, date of purchase, and purchasing entity;

(iii) Evidence of property transferred from abroad for use in the United States enterprise, including United States Customs Service commercial entry documents, bills of lading and transit insurance policies containing ownership information and sufficient information to identify the property and to indicate the fair market value of such property;

(iv) Evidence of monies transferred or committed to be transferred to the new commercial enterprise in exchange for shares of stock (voting or nonvoting, common or preferred). Such stock may not include terms requiring the new commercial enterprise to redeem it at the holder's request; or

(v) Evidence of any loan or mortgage agreement, promissory note, security agreement, or other evidence of borrowing which is secured by assets of the petitioner, other than those of the new commercial enterprise, and for which the petitioner is personally and primarily liable.

At the time of filing the petition, counsel asserted that the entire \$500,000 had been contributed. As evidence of this assertion, the petitioner submitted the Partnership Agreement for [REDACTED] his subscription agreement, and an "assignment." The petitioner also submitted a wire transfer receipt indicating that an unknown source transferred \$100,000 into counsel's personal account. The subscription agreement states that the petitioner "commits" a total of \$500,000 to the partnership. However, the agreement only obligates the petitioner to pay in cash an initial \$100,000. Regarding the remaining investment, the agreement provides:

The balance of said capital investment USD \$400,000 is hereby pledged and collateralized by investor's assets hitherto by an irrevocable assignment and has been preapproved by the General Partner.

The assignment provides that the petitioner:

assign[s] all rights, title and interest in all my world-wide assets for the purpose of collateralization of said payment (USD \$400,000) to [REDACTED]

L.P. as capital contribution for my investment with American Business Capital Corporation.

In the absence of a deed or other evidence that title had been transferred from the petitioner to the Partnership, the director correctly concluded that this agreement constitutes a promissory note with the petitioner's assets as collateral, to be seized only in the event the petitioner fails to pay the \$400,000.¹ As the petitioner has not demonstrated that his personal assets are amenable to seizure by the Partnership should he fail to pay the \$400,000, the director correctly applied Matter of Hsiung, I.D. 3361 (Assoc. Comm., Examinations, July 31, 1998), in determining that the loan was not adequately secured.²

In addition, the director expressed concerns that the \$100,000 allegedly invested in cash was wired to counsel's personal account from an unspecified source. Counsel asserts on appeal that the funds were transferred to counsel's account because it was the "safest and most efficient manner to transfer funds." However, counsel fails to provide any documentation to demonstrate that the petitioner owned the account from which the \$100,000 was transferred or that counsel subsequently transferred these funds to the Partnership. It remains, the petitioner has not demonstrated that he has contributed any capital to the Partnership.

The director further concluded that the petitioner had not demonstrated that any Partnership funds had been made available to

¹ In arguing that the precedent decisions should not be applied to the adjudication of this petition, counsel asserts, as an example of the petitioner's reliance on previous "standards," that the petitioner had no idea that his arrangement would be interpreted as a promissory note when he signed the assignment as it was prior to the issuance of the precedent decisions. However, in determining that the agreement was a promissory note, the director relied on Black's Law Dictionary, which was in existence at the time the petitioner signed the assignment.

² As discussed by the director, Matter of Hsiung, supra, requires that the petitioner establish ownership of the assets, that the assets are in fact securing the note, that the security interest has been perfected or recorded according to local law, and that the assets are amenable to seizure by a U.S. note holder. Furthermore, the petitioner must show that the assets have sufficient fair market value to secure the amount of the note, considering the assessed value of the assets and the estimated cost of seizing the assets. Id. at 3-5. Counsel does not argue that the director incorrectly concluded that the petitioner failed to establish the above factors. Counsel's argument that the director should not have relied on Matter of Hsiung will be discussed below.

the job-creating enterprise. The Partnership Agreement provides that its purpose is to create operating companies that will create employment in exchange for venture capital investment. The business plan provides that the first two operating companies already in process are [REDACTED] Inc. and [REDACTED]

[REDACTED] In support of the petition, the petitioner submitted the articles of incorporation for both alleged operating companies.

The director noted that the record did not contain an operating or other agreement outlining the financial obligations of the partnership to either [REDACTED] Inc. or [REDACTED]

[REDACTED]. The articles of incorporation do indicate that [REDACTED] (President and CEO of [REDACTED], Inc., the initial limited partner and trustee of the Partnership) is the registered agent of both corporations. However, the record reveals no formal, legal, or otherwise enforceable agreement between the Partnership and the corporations.

Moreover, even if the record did contain agreements between the corporations and "American Capital Investors, L.P." the record contains a registration of fictitious name for the Partnership. Therefore, according to 620.103(3) of the Partnership Laws of Florida, there is the possibility that there are several partnerships with this name in Florida. Any agreement with "American Capital Investors, L.P." would need to provide more detail about the identity of the Partnership.

In addition, in the Partnership Agreement under Article VIII, Powers and Rights of Limited Partners, under the subheading "Special Information and Voting Rights," Section 8.02 provides:

Between three (3) and five (5) years after the closing of the Offering, on the anniversary date of the investment, each Venture Business will repurchase its member interest from the Partnership. Said repurchase must be for the par value of the member interest. Upon the redemption of the Venture Business(es)' member interest, any of the Limited Partners may, at their option, elect to tender their respective Limited Partnership interest to the Partnership and withdraw from the Partnership. (Emphasis added.)

Without the operating agreement between the Partnership and the "venture businesses," the Service is unable to determine whether the Partnership is actually contributing capital or whether it is loaning the capital. As 8 C.F.R. 204.6(e) specifically prohibits the use of loans to the enterprise as an investment, the petitioner cannot get around this prohibition simply by loaning the money to a third party (in this case, the Partnership) to be subsequently loaned to the job-creating enterprise.

The full amount of the requisite investment must be made available to the business most closely responsible for creating the employment upon which the petition is based. Matter of Izumii, Int. Dec. 3360 (Assoc. Comm., Examinations, July 13, 1998). The petitioner has not demonstrated that any of his funds have been made available to either [REDACTED], Inc. or [REDACTED], Inc.

SOURCE OF FUNDS

8 C.F.R. 204.6(j) states, in pertinent part, that:

(3) To show that the petitioner has invested, or is actively in the process of investing, capital obtained through lawful means, the petitioner must be accompanied, as applicable, by:

(i) Foreign business registration records;

(ii) Corporate, partnership (or any other entity in any form which has filed in any country or subdivision thereof any return described in this subpart), and personal tax returns including income, franchise, property (whether real, personal, or intangible), or any other tax returns of any kind filed within five years, with any taxing jurisdiction in or outside the United States by or on behalf of the petitioner;

(iii) Evidence identifying any other source(s) of capital; or

(iv) Certified copies of any judgments or evidence of all pending governmental civil or criminal actions, governmental administrative proceedings, and any private civil actions (pending or otherwise) involving monetary judgments against the petitioner from any court in or outside the United States within the past fifteen years.

The director correctly concluded that the petitioner had not established that the \$100,000 wired to counsel were the petitioner's personal funds. The wire transfer receipt indicates the sender was Union Bank of Switzerland, Singapore. However, the petitioner has not submitted any evidence that the account number referenced on the wire transfer receipt corresponds to his personal account or even that he has ever had an account at that bank.

The petitioner submitted his degree, his resume indicating employment as an office manager from January 1993 to December 1995, a list of assets provided by [REDACTED], a conversion table indicating those assets are worth \$531,948.85, and a letter from

Cayman Bank, Ltd. indicating the petitioner has various accounts at that institution totaling 370,000 in an unspecified currency.

A mere letter purporting to document \$531,948.85 of assets is insufficient. The petitioner has not submitted bank statements, investment statements, or stock certificates. The resume is insufficient to establish any income from his occupation as an office manager. An unsubstantiated claim of employment will not suffice to establish the source of funds; the petitioner has not provided evidence of having worked and having received a salary for the employment. See Matter of Ho, I.D. 3362 (Assoc. Comm., Examinations, July 31, 1998), at 7; Matter of Treasure Craft of California, 14 I&N Dec. 190 (Reg. Comm. 1972). The petitioner did not provide five years of tax returns as required by the regulations. Nor has the petitioner provided any evidence that his overseas assets originated from a lawful source.

THE PETITIONER HAS NOT ESTABLISHED A NEW COMMERCIAL ENTERPRISE

Section 203(b)(5)(A)(i) of the Act states, in pertinent part that: "Visas shall be made available . . . to qualified immigrants seeking to enter the United States for the purpose of *engaging in a new commercial enterprise . . . which the alien has established . . .*" (Emphasis added.)

8 C.F.R. 204.6(h) states that the establishment of a new commercial enterprise may consist of the following:

- (1) The creation of an original business;
- (2) The purchase of an existing business and simultaneous or subsequent restructuring or reorganization such that a new commercial enterprise results; or
- (3) The expansion of an existing business through the investment of the required amount, so that a substantial change in the net worth or number of employees results from the investment of capital. Substantial change means a 40 percent increase either in the net worth, or in the number of employees, so that the new net worth, or number of employees amounts to at least 140 percent of the pre-expansion net worth or number of employees. Establishment of a new commercial enterprise in this manner does not exempt the petitioner from the requirements of 8 CFR 204.6(j)(2) and (3) relating to the required amount of capital investment and the creation of full-time employment for ten qualifying employees. In the case of a capital investment in a troubled business, employment creation may meet the criteria set forth in 8 CFR 204.6(j)(4)(ii).

8 C.F.R. 204.6(e) states that:

Troubled business means a business that has been in existence for at least two years, has incurred a net loss for accounting purposes (determined on the basis of generally accepted accounting principles) during the twelve or twenty-four month period prior to the priority date on the alien entrepreneur's Form I-526, and the loss for such period is at least equal to twenty per cent of the troubled business's net worth prior to such loss. For purposes of determining whether or not the troubled business has been in existence for two years, successors in interest to the troubled business will be deemed to have been in existence for the same period of time as the business they succeeded.

According to the plain language of section 203(b)(5)(A)(i) of the Act, a petitioner must show that he is seeking to enter the United States for the purpose of engaging in a new commercial enterprise that he has established. The alleged new commercial enterprise at issue here is [REDACTED] in which the petitioner became a limited partner on an unspecified date.³

The director correctly concluded that since the petitioner was unable to demonstrate that he had invested any funds in the Partnership which was incorporated in 1997, he was unable to demonstrate that he had established what is claimed to be the new commercial enterprise.

Moreover, it is the job-creating business that must be examined in determining whether a new commercial enterprise has been created. Matter of Soffici, I.D. 3359 (Assoc. Comm., Examinations, June 30, 1998) at 10.

The petitioner has not demonstrated that Ocean Marine Air Conditioning, Inc. and CPC Landing Gear, Inc. are not merely purchasing existing businesses. If that were the case, the petitioner would need to demonstrate the necessary expansion as provided in 8 C.F.R. 204.6(h)(3).

Beyond the decision of the director, it is noted that the petitioner will not be engaging in the enterprise. 8 C.F.R. 204.6(j)(5)(iii) states that if a limited partner is granted the "certain rights, powers, and duties normally granted to limited partners" under the ULPA, she is sufficiently engaged in the

³ The wire transfer from an unidentified source to counsel is dated August 6, 1997. However, the date on the subscription agreement and assignment is December 4, 1998 with a "7" typed over the 8.

management of the partnership. Article VIII of the [REDACTED] purports to grant Limited Partners the normal rights of a limited partner under the Florida Revised Uniform Limited Partnership Act. However, under Article XV of the Partnership Agreement, all limited partners irrevocably appoint the General Partner as his or her attorney-in-fact, with all power of substitution. Being given a right and then immediately assigning it to someone else, irrevocably, is conceptually no different from being prohibited from exercising the right in the first place.

Despite the superficial language in Article VIII, it is clear that the petitioner here does not in fact have the rights normally granted to limited partners under the [REDACTED]. As such, the petitioner is a purely passive investor.

THE PLAN DOES NOT MEET THE EMPLOYMENT-CREATION REQUIREMENT

8 C.F.R. 204.6(j)(4)(i) states:

To show that a new commercial enterprise will create not fewer than ten (10) full-time positions for qualifying employees, the petition must be accompanied by:

(A) Documentation consisting of photocopies of relevant tax records, Form I-9, or other similar documents for ten (10) qualifying employees, if such employees have already been hired following the establishment of the new commercial enterprise; or

(B) A copy of a comprehensive business plan showing that, due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired.

8 C.F.R. 204.6(e) states, in pertinent part:

Full-time employment means employment of a qualifying employee by the new commercial enterprise in a position that requires a minimum of 35 working hours per week.

Qualifying employee means a United States citizen, a lawfully admitted permanent resident, or other immigrant lawfully authorized to be employed in the United States including, but not limited to, a conditional resident, a temporary resident, an asylee, a refugee, or an alien remaining in the United States under suspension of deportation. This definition does not include the alien

entrepreneur, the alien entrepreneur's spouse, sons, or daughters, or any nonimmigrant alien.

Finally, 8 C.F.R. 204.6(g)(2) relates to multiple investors and states, in pertinent part:

The total number of full-time positions created for qualifying employees shall be allocated solely to those alien entrepreneurs who have used the establishment of the new commercial enterprise as the basis of a petition on Form I-526. No allocation need be made among persons not seeking classification under section 203(b)(5) of the Act or among non-natural persons, either foreign or domestic. The Service shall recognize any reasonable agreement made among the alien entrepreneurs in regard to the identification and allocation of such qualifying positions.

While not directly discussed by the director, the petitioner has also failed to demonstrate that his investment will create the required number of jobs.

The record does not reveal that [REDACTED] Inc. and [REDACTED] Inc. have hired any employees. Pursuant to 8 C.F.R. 204.6(j)(4)(i)(B), if the employment-creation requirement has not been satisfied prior to filing the petition, the petitioner must submit a "comprehensive business plan" which demonstrates that "due to the nature and projected size of the new commercial enterprise, the need for not fewer than ten (10) qualifying employees will result, including approximate dates, within the next two years, and when such employees will be hired." To be considered comprehensive, a business plan must be sufficiently detailed to permit the Service to reasonably conclude that the enterprise has the potential to meet the job-creation requirements.

A comprehensive business plan as contemplated by the regulations should contain, at a minimum, a description of the business, its products and/or services, and its objectives. Matter of Ho, supra. Elaborating on the contents of an acceptable business plan, Matter of Ho states the following:

The plan should contain a market analysis, including the names of competing businesses and their relative strengths and weaknesses, a comparison of the competition's products and pricing structures, and a description of the target market/prospective customers of the new commercial enterprise. The plan should list the required permits and licenses obtained. If applicable, it should describe the manufacturing or production process, the materials required, and the supply sources. The plan should detail any contracts executed for the

supply of materials and/or the distribution of products. It should discuss the marketing strategy of the business, including pricing, advertising, and servicing. The plan should set forth the business's organizational structure and its personnel's experience. It should explain the business's staffing requirements and contain a timetable for hiring, as well as job descriptions for all positions. It should contain sales, cost, and income projections and detail the bases therefor. Most importantly, the business plan must be credible.

The business plan submitted indicates that in the first two years, [REDACTED], Inc. will hire 60 employees and [REDACTED]. will hire another 60 employees. However, the plan does not adequately explain these corporations' staffing requirements and provide job descriptions for all positions. Nor does the plan indicate whether all of these jobs will be full-time positions.

RETROACTIVE APPLICATION OF PRECEDENT DECISIONS

In his decision, the director stated that the petition was reviewed in accordance with the four 1998 precedent decisions issued by the Administrative Appeals Office (AAO). The director cited 8 C.F.R. 103.3(c) which provides:

Service precedent decisions. In addition to Attorney General and Board decisions referred to in §3.1(g) of this chapter, designated Service decisions are to serve as precedents in all proceedings involving the same issue(s). Except as these decisions may be modified or overruled by later precedent decisions, *they are binding on all Service employees in the administration of the Act.* (Emphasis added.)

Despite the clear language of the regulations, counsel argues that the AAO precedent decisions are not binding on Service employees where there is a hardship to the petitioner and that the petitioner relied on "the Regulations which were in existence at the time the initial steps were taken." Counsel cites Ruangswang v. INS, 591 F.2d 39 (9th Cir. 1978) as well as other federal cases in support of his argument.

In Ruangswang, the court reviewed a situation where the Board of Immigration Appeals had overruled a previous standard in a previous precedent. The resulting new precedent dramatically changed the standards under which the petition in question would be adjudicated. Specifically, the Board substituted an objective standard for the previous subjective standard of "substantial investment."

Counsel's reliance on the court's decision in Ruangswang is misplaced. The AAO precedent decisions were simply interpreting the published regulations on which the petitioner claims to have relied. The four decisions did not create new standards or new rules.

In R.L. Investment Limited Partners, 86 F.Supp.2d 1014, (D. Hawaii 2000) the district court distinguished Ruangswang and concluded that the AAO precedent decisions did not involve rulemaking.

The provision at issue in Ruangswang contained "objective criteria (a \$10,000 investment, and one year's experience or qualified training), which the petitioner had clearly met. There "simply [was] no room for the agency to interpret the regulation so as to add another requirement." [Citation omitted.] By contrast, in applying the precedent decisions here, the INS did not add any requirement.

R.L. Investment Limited Partners, supra. The court further found that the plaintiff had not demonstrated any hardship as the petitioner in that case still had his \$500,000. The petitioner of the instant petitioner has likewise not demonstrated any hardship to himself. As the wire transfer receipt does not indicate that the \$100,000 originated from the petitioner's account and the record does not reveal that the assignment of his world-wide assets is enforceable should he fail to pay the additional \$400,000, the petitioner has not demonstrated that he has committed any of his own personal funds.

Regarding the Service's application of the precedent decisions, the District Court for the Western District of Washington stated in an unreported decision:

Although it is clear to this Court that the plaintiff designed its program based upon a different interpretation of the governing regulations than that applied by Izumii, and although the plaintiff received prior positive feedback from the Service regarding its program design, the law is clear that the "prior approvals simply represented the Agency's prior (short lived) interpretation of the statute . . . [which] [t]he Agency was free to change." Chief Probation Officers v. Shalala, 118 F.3d 1327, 1334 (9th Cir. 1997.)

Golden Rainbow Freedom Fund v. Janet Reno, Case No. C99-0755C (W.D. Washington Sept. 14, 2000). That court specifically noted that there had been no long-standing history or previous binding decisions from which an irrational departure would not be allowed.

The AAO precedent decisions merely clarified and reaffirmed longstanding statutory and regulatory law as applied to certain facts presented, which happen to exist in this case as well. They did not impose additional requirements beyond those already set forth by the regulations. Under any proper reading of the language of the regulations, this petitioner is not eligible for classification as an alien entrepreneur.

For all of the reasons set forth above, considered in sum and as alternative grounds for denial, this petition cannot be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. The petitioner has not met that burden. Accordingly, the petition will be denied.

ORDER: The appeal is dismissed.